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Supreme Court, U. S.
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MICHAEL RODAK, JR., CLE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

NO. 72-1530

R. P. DUGAS, *Petitioner*

versus

THE KANSAS CITY SOUTHERN RAILWAY COMPANY, ET AL, *Respondents*

PETITION FOR WRIT OF CERTIORARI
To The United States Court of Appeals
For The Fifth Circuit
AND APPENDICES

W. JAMES KRONZER, JR.
500 Houston First Savings Bldg.
711 Fannin Street
Houston, Texas 77002

Attorney for Petitioner

Alpha Law Brief Co., One Main Plaza, No. 1 Main St., Houston, Texas 77002

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

NO._____

R. P. DUGAS, *Petitioner*

versus

THE KANSAS CITY SOUTHERN RAILWAY COMPANY, ET AL, *Respondents*

PETITION FOR WRIT OF CERTIORARI
To The United States Court of Appeals
For The Fifth Circuit
AND APPENDICES

To The Honorable Supreme Court of The United States:

R. P. Dugas respectfully petitions the Court to grant a Writ of Certiorari to review the Opinion and Judgment of the United States Court of Appeals for the Fifth Circuit, and to thereafter reverse that Judgment and affirm the Judgment of the trial Court.

OPINIONS BELOW

1) The District Court did not render an Opinion.

2) The Opinion of the Court of Appeals is not yet reported, and it is therefore attached as Appendix "A."

3) The Opinion of the Court of Appeals on motion for rehearing appears as Appendix "B."

STATEMENT OF JURISDICTION

Petitioner seeks to review the Opinion and Judgment of the Court of Appeals under date of February 2, 1973. Petitioner's motion for rehearing was overruled on March 27, 1973. (See Appendix "B") Statutory jurisdiction is conferred under Title 28 U.S.C.A. §1254.

QUESTIONS PRESENTED

1) Whether the inclusion of the phrases "loss of the enjoyment of life" and "loss of vitality" in an oral charge submitted in the trial of an injured railroad employee's cause constitutes "separate elements of damage for which no recovery is permissible under the Federal Employers' Liability Act." 45 U.S.C.A. §51, et seq.

2) Whether the inclusion of such phrases constitutes a dual or double submission with the phrases "mental pain and anguish" and "physical impairment," to which they were respectively conjoined.

3) Whether in a Federal Employers' Liability Act case, the cause may be reversed and remanded for a new trial on the issue of damages when the reversing Court concludes only that the jury "could have been confused" by the inclusion of such language in an oral charge. Rule 61, Federal Rules of Civil Procedure.

STATUTORY PROVISIONS AND RULES INVOLVED

1) Under the first and second questions presented, §51 of Title 45 provides in pertinent part:

> "Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, *shall be liable in damages to any person suffering injury* while he is employed by such carrier in such commerce. . . ." (Emphasis added.)

2) Under the third question presented, the conclusion of the Court of Appeals that the jury "could have been confused," thus requiring a reversal, invokes Rule 61, Federal Rules of Civil Procedure, reading:

> "HARMLESS ERROR"
>
> "No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in *anything done or omitted by the court* or by any of the parties is ground for granting a new trial or setting aside a verdict or for vacating, modifying, or otherwise disturbing a Judgment or Order, unless refusal to take such action appears to the court inconsistent with substantial justice. *The court at every stage of the proceeding may disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.*" (Emphasis added.)

STATEMENT OF THE CASE

R. P. Dugas, a black man, was severely injured while working in the scope of his employment for Respondent railroad when a railroad boxcar door he and a co-worker were trying to open fell upon him. Under a lengthy oral charge, the jury found in his favor and determined that his "damages" were in the amount of $200,000. No contributory reduction or mitigation resulted.

On appeal to the United States Court of Appeals for the Fifth Circuit, it was held that:

1) The liability determination of the jury must be sustained;

2) That the award was not excessive; but

3) The cause should be reversed and remanded on the question of "damages" alone, due to the inclusion of certain phraseology "which could have confused the jury as to the correct standards it had a duty to apply" in ascertaining the damages.

As stated, the Charge of the Court, which was "general" and "oral," and consumed some twenty-five pages of the record, contains the following language with respect to the damages instructions:

> "Now should you find the railroad line liable under some theory about which you have been instructed concerning the specific acts of negligence or the doctrine of res ipsa loquitur, you find for the plaintiff, then it would be your duty to determine the amount of damages which you find the plaintiff is entitled to and in considering Mr. Dugas' injuries

and damages you are to consider the value of such damages as would fully and fairly compensate the plaintiff in dollars and cents for such injuries sustained on May 25th, 1970. In connection with the answer to this question you will take into account such of the following elements as you find have been established by a preponderance of the evidence. Such physical pain, *mental anguish and loss of enjoyment of life* as the plaintiff has sustained from the date of occurrence until the date of trial, such physical pain and *mental anguish and loss of enjoyment of life* as plaintiff may in reasonable probability sustain in the future beyond this date; such loss of earning power, *physical impairment and loss of vitality* as plaintiff has sustained from the date of the occurrence until the date of the trial; such loss of earning power, *physical impairment and loss of vitality* as plaintiff will in reasonable probability sustain in the future beyond this date. Also, such reasonable medical expenses that the plaintiff will in all medical probability sustain in the future beyond the date of the trial resulting from the occurrence in question on May 25th, 1970." (Emphasis added)

Similar descriptive language was included in at least one other portion of the charge.

Respondent's objections were:

"Your Honor, I have two other points that I do think are probably rather serious along the lines that Mr. Kronzer said, and I will put them in the form of an objection, in the charge where the Court charted that in the elements of damage recovery could be had on mental anguish and for loss of enjoyment of life and then recovery for physical

> impairment and loss of vitality. I think really they are one and the same, but the way the charge was given it sounds like there are a total of four separate elements of damage. *Really mental anguish and loss of enjoyment is one thing and I believe the proper instruction on mental anguish, pain and suffering and on the other hand, physical impairment and those would be confusing and indicated additional grounds for recover, that the law doesn't provide for.*" (Emphasis added)

The Court of Appeals did not precisely hold that it is improper to include the phraseology "loss of enjoyment of life" and "loss of vitality" in the F.E.L.A. charge on "damages," but rather it held that when such claims are made and included, they must be an "included element" of the consequences of physical injury. Its final conclusion was that the jury "could have (been) confused" by the manner in which the District Court "included" the phrases in its charge.

REASONS FOR GRANTING THE WRIT

1) Uniform application of the Federal Employers' Liability Act does not admit of such attenuated subtleties.

The Court of Appeals announced that it had found no precedent for its holding. That is a true statement! Nor did counsel for Respondent furnish any supporting decisional law.

At the base of the Court's conclusion that "The defendant must pay damages, but * * * is entitled to have a jury measure those damages according to clear, legally correct, plainly enunciated standards, * * * (page 31)

is the mistaken belief that this Court so announced the only damage "elements" in *Chesapeake & Ohio R.R. Co. v. Carnahan,* 241 U.S. 241, 36 S.Ct. 594, 60 L.Ed. 979 (1916), and that the *Carnahan "elements"* have been continuously applied as the outer limits in the "Numerous reported cases [that] follow this decision and these standards." (See page 11 of the Opinion) The Court even indicates that *Grunenthal v. Long Island Railroad Company,* 388 F.2d 480, 484 (2 Cir. 1968), rev'd on other grounds, 393 U.S. 156, 89 S.Ct. 331, 21 L.Ed.2d 309 (1968) **supports** this interpretation, a contention not even counsel for Respondent has had the temerity to suggest.

We respectfully suggest that *Carnahan* does not establish limiting "elements" and "plainly enunciated standards" for the determination of damages in a F.E.L.A. case, and certainly it made no distinction between "including" "loss of enjoyment of life" and "loss of vitality" in the "mental anguish" and "physical impairment" elements, respectively, and treating such matters as separate and independent "elements" merely because the conjunction "and" was inserted between the phrases.

Carnahan only involved the question of whether the following instruction "involved a consideration of consequences which might be essentially speculative and remote":

> "The court instructs the jury that if they believe from a preponderance of the evidence that the defendant is liable to the plaintiff in this action, then in assessing damages against the defendant, they may take into consideration the pain and suffering of the plaintiff, his mental anguish, the bodily injury

> sustained by him, his pecuniary loss, his loss of power and capacity for work and its effect upon his future, not however, in excess of $35,000, as to them may seem just and fair."

To be more specific, the precise holding was:

> "The comment of the court is accurate and we can add nothing to it. The principle is established that when the evidence in a case shows that there will be future effects from an injury, an instruction which justifies an inclusion of them in an award of damages is not error. Washington & G. R. Co. v. Harmon **(Washington & G. R. Co. v. Tobriner)**, 147 U.S. 571, 37 L.ed. 284, 13 Sup. Ct. Rep. 557; McDermott v. Severe, 202 U.S. 600, 50 L.ed. 1162, 26 Sup. Ct. Rep. 709."

There is simply nothing in *Carnahan*, or *any* subsequent decision citing it, that will lend support for the Court of Appeals most illiberal holding.

We would request the Court to note the reference in the *Carnahan* case to the earlier holding in *Washington & G. R. Co. v. Tobriner*, 147 U.S. 571, 13 S.Ct. 557, 37 L.Ed. 284 (1893), in which the following instruction was approved:

> "If the jury finds for the plaintiff, they will find for him such an amount of damages as will fully compensate him for the suffering of mind and body inflicted upon him by his injury, for the *personal inconvenience*, the loss of time, and the expenses of cure that naturally and proximately resulted from the injury he suffered; and, if they find that the injuries sustained by the plaintiff are permanent,

> they will also find for him such damages as will fully compensate him for the suffering of mind and body, the *personal inconvenience,* and the loss of time that he will suffer in the future. In determining this, as to the future, they will consider plaintiff's *bodily vigor* and age, as shown by the evidence adduced." (Emphasis added.)

True, *Tobriner* is not an F.E.L.A. case, but it was cited with approval in the *Carnahan* case, as was the earlier decision of the Court in *Arizona Eastern Rd. v. Byran,* 242 U.S. 621, 37 S.Ct. 241, 61 L.Ed. 532 (1916), affirming *per curian Arizona Eastern Rd. Co. v. Bryan,* 157 Pac. 376, 381 (Sup. Ariz. 1916), also a F.E.L.A. case, and in which the Arizona Supreme Court said:

> "The court instructed the jury that, if they found for the plaintiff, they would find such "an amount of damages as will fully compensate him for *all suffering of mind and body* inflicted upon him by his injury and for the personal inconvenience and the loss of time and expense of care that naturally and proximately resulted from the injury," and applied the same rule in case they should find that the plaintiff's injuries are permanent. Error is assigned for the reasons that *"personal inconvenience is not an element of damages for which the appellee may recover,"* for either temporary or permanent injuries; and without further explanatory instructions the words "personal inconvenience" are too indefinite and uncertain. Further objection is made to the use of the words full compensation." These objections to the instruction are fully answered in Washington & G. R. R. Co. v. Tobriner, 147 U.S. 571, 13 Sup. Ct. 557, 37 L.Ed. 284, where substantially the same worded instruction was approved by that court and properly so approved." (Emphasis added.)

Manifestly, if "personal inconvenience" and "bodily vigor" are not objectionable, then how can it be said that "loss of enjoyment of life" and "loss of vitality" stand on different grounds?

We submit it to be quite clear that *Carnahan* does not impose limits on the "includable elements," nor has it ever been cited for that purpose. As previously indicated, the Court of Appeals indicated it had found no cases in point, but more accurately, it found no decisions supporting its conclusion. The Court has not seen fit to mention the clear pronouncements of the Court of Appeals of the District of Columbia in *Taylor v. Washington Terminal Co.*, 409 F.2d 145, 149 (1969) ["Projecting the pain and suffering, the anxiety, **and the loss of enjoyment of life** * * *"], or the Second Circuit in *Lebrecht v. Bethlehem Steel Corp.*, 402 F.2d 585, 592 (1968) ["* * * the jury is entitled to consider the effect of plaintiff's injuries on **'normal pursuits and pleasures of life'** (citing *Grunenthal*), * * *"], and, even more specifically, the language of the Third Circuit in *Downie v. United States Lines*, 359 F.2d 344, 347 (1966), wherein the Court said:

> "The injured seaman is also entitled to compensation, again based on life expectancy at the time of injury, for the *physical and mental effects of the injury on his ability to engage in those activities which normally contribute to the enjoyment of life, including for, example, his avocations. Dagnello v. Long Island Railroad Company*, 289 F.2d 797 (2nd Cir. 1961). See *Bassett v. Milwaukee, Northern Ry. Co.*, 169 Wis. 152, 170 N.W. 944, 945 (Sup. Ct. Wis. 1919); *Kasiski v. Central Jersey Power and Light Co.*, 4 N.J. Misc. 130, 132 A. 201 (Sup. Ct. N.J. 1926); Annotations, 120 A.L.R. 535-543. The spe-

> cific elements which may enter into an award of damages under this rule *must necessarily depend upon the proofs. There are no precise criteria by which these elements may be evaluated but they are measurable to the same extent as pain, suffering and mental anguish.*" (Emphasis added.)

While the specific holding in the *Downie* case related to the right to include the element of shortening of life expectancy in a Jones Act case, the treatment of the so-called "elements of damage" by the Third Circuit is of significance in the case at bar. In footnote 3 to the above quotation, after observing that "The *specific elements* which may enter into an award of damages under the rule must necessarily depend upon the proofs," the Third Circuit said:

> "Examples of *provable elements* are: inability to dance, bowl, swim or engage in similar recreational activities; inability to perform customary household chores; and inability to engage in the usual family activities." (359 F.2d at p. 347) (Emphasis added.)

Again, the Court of Appeals concluded:

> "While we have found no federal case, and we have cited none, on the subject of 'loss of vitality,' we are equally certain that this item is an included element of the consequences of physical injury, not separately to be measured independently of the basic premise." (See p. 28 of the Opinion, Appendix "A.")

To the contrary, in *Sleeman v. Chesapeake & Ohio Railroad,* 290 F.Supp. 817 (Mich. 1968), reversed on other grounds, 414 F.2d 305 (1968), on remand and subsequent appeal, 305 F.Supp. 33 (1969); 424 F.2d 547

(1970). In awarding damages, the trial Court in that case computed the value of "loss of physical power, vitality, and enjoyment of life."

The decision of the Court below is without precedent. All the decisional law is to the contrary. The philosophy and purpose of the Federal Employers' Liability Act is thwarted if such decisions as this are permitted to stand. It was not doubted by the Court of Appeals, nor denied by counsel for Respondents, that the proof fully and adequately supports the "elements of damage" submitted for the consideration of the jury, whether "loss of enjoyment" and "loss of vitality" are "separate elements of damage" or not.

In truth and in fact, the objections leveled against the charge by counsel for Respondents were nothing more nor less than the usual and customary "flyspeck" criticisms seen in the State Court practice in Texas. The language of this Court in *New York Central Railroad Co. v. Winfield*, 244 U.S. 147, 37 S.Ct. 594, 61 L.Ed. 1045 (1916) still commends itself as an acceptable rubric:

> "Whether and in what circumstances railroad companies engaged in interstate commerce shall be required to compensate their employees in such commerce for injuries sustained therein are matters in which the Nation as a whole is interested and there are weighty considerations why the controlling law should be uniform and not change at every state line * * * * It was largely in recognition of this that the Employers' Liability Act was enacted by Congress * * * * A federal statute of this character will supplant the numerous state statutes on the subject so far as they relate to interstate commerce. It will create uniformity throughout the Union, and

> the legal status of such employers' liability for personal injuries instead of being subject to numerous rules will be fixed by one rule in all the states * * *" (Ellipsis by the undersigned.)

The Court of Appeals gave an undue and overly restrictive interpretation to § 51 of Title 45, United States Code.

2) Strictly construing the language of the charge, the phrases "loss of enjoyment" and "loss of vitality" were included in the elements to which they related; namely, "mental anguish" and "physical impairment," respectively.

Relating ourselves to what we believe the erroneous premise of the Court that *Carnahan* and *Grunenthal* permit the *inclusion* of the items within the framework of the "established elements," but condemns them when they are not, we suggest the new rule is not even grammatically correct. The instruction reads:

> "Such physical pain, mental anguish *and* loss of enjoyment of life as the plaintiff has sustained from the date of occurrence until the date of trial, such physical pain *and* mental anguish *and* loss of enjoyment of life as plaintiff may in reasonable probability sustain in the future beyond this date, such loss of earning power, physical impairment, *and* loss of vitality as plaintiff has sustained from the date of the occurrence until the date of the trial; such loss of earning power, physical impairment, *and* loss of vitality as plaintiff will in reasonable probability sustain in the future beyond this date." (Emphasis by the Court.)

If the phrases were not properly conjoined with the elements to which they were supposed to be relevant, what conceivable language could have been employed to make the "new elements" properly embraced? We say none, simply because they were correctly tied to pain and anguish and physical impairment, respectively.

3) Under the F.E.L.A., all doubts should be resolved in favor of the injured employee to accomplish the remedial purposes of the legislation.

In F.E.L.A. cases it has long been the law that

> "Whether the instructions could have produced misconception in the minds of the jury is not to be ascertained by merely considering isolated statements, but by taking into view all the instructions given and the tendencies of the proof in the case to which they could possibly be applied."
> *Seaboard Air Line Ry. v. Padgett,* 236 U.S. 668, 35 S.Ct. 668, 669 (1915)

As Judge Medina observed in *Rattigan v. New York Central R. Co.,* 291 F.2d 548 (2 Cir. 1961), cert. den. 368 U.S. 891, 82 S.Ct. 144, 7 L.Ed.2d 89 (1961), "* * * the United States Supreme Court has told us in various ways and on numerous occasions that in these F.E.L.A. cases the railroad employee is to be *given the benefit of every doubt.* * * * (citing numerous cases and emphasis added)."

Has Dugas been given the benefit of *any* doubt? We suggest this question must be answered in the negative! On page 31 the Court says—as it must say in view of the length of the charge and the attenuated casuistries of

the Court—that "they (the condemned phrases) were couched in terms WHICH COULD HAVE CONFUSED the jury as to correct standards it had a duty to apply in this regard."

From the inception of the F.E.L.A. this Court, and every other Federal or State Court, have adhered to the premise announced in *Johnson v. Southern Pac.*, 196 U.S. 1, 25 S.Ct. 158, 49 L.Ed. 493 (1904) that,

> "The history of the Employers' Liability Act and its remedial purpose impel to the conclusion that it should be liberally construed as to the inclusion of its beneficiaries in order to effect its remedial purpose notwithstanding the fact that it is in derogation of the common law."

The "remedial purpose" is not served by a reversal in a cause in which the Court has concluded no more than that the jury "could have been confused," and yet at the same time has correctly held the *quantum* of damage not to be "excessive."

4) The holding of the Court of Civil Appeals is in contravention of Rule 61, F.R.C.P., the "harmless error" rule.

The Court of Appeals correctly determined and held that the liability aspects of the verdict were supportable. In fact, other than attacking the *res ipsa loquitur* instruction, Respondents leveled no attack against the underlying evidence girding or supporting the verdict. The Court of Appeals went further and decided, unnecessarily, that the verdict was not "excessive." In that connection, the Court querulously observed:

> "Since we have concluded that the case must be remanded for a new trial on the issue of damages alone, *it ordinarily would not be necessary* for us to consider the assignment that the jury awarded excessive damages. Since, however, that is the very issue which must be tried anew, we feel that we must discuss that subject." (See p. 31 of the Opinion, Appendix "A", emphasis added)

Whereupon, the Court proceeded to review the evidence and determine that the verdict was not excessive. How this would aid a jury on a retrial escapes the undersigned! We suggest that the Court of Appeals appears to be expiating itself because of the incredible holding. It is almost as though it wanted this Court to review the case.

At any rate, when the following factors are considered, it is submitted that the "harmless error" rule should have been applied:

1) The charge was oral and lengthy, and it is inconceivable that the jury could have been misled.
2) The Court of Appeals determined that the damages were not excessive.
3) No complaint with respect to jury argument or other impropriety was urged in the Court below.
4) The Court did no more than conclude that the jury "could have been confused" by the inclusion of such language in the oral and lengthy charge.

The mandate of Rule 61 is that no cause should be reversed on mere possibilities, or unless the refusal to reverse "appears to the Court inconsistent with substantial justice."

Patently, "substantial justice" has not been accorded R. P. Dugas under this record.

CONCLUSION AND PRAYER

The undersigned is fully mindful of the burdens upon this Court, and the reluctance it has to police the various Circuits in all matters arising under the Federal Employers' Liability Act or other federal rights legislation. The present case, however, is not one having to do with the sufficiency of the evidence, but with an undue restriction on the measure of damages recoverable under §51 of Title 46, United States Code Annotated.

The *Carnahan* decision does not support the holding of the Court of Appeals, nor does any other decision with which we are familiar support the conclusion that the jury "could have been confused" by the inclusion of the objected-to language in the charge. Whereas no substantial injustice will result by an affirmance, manifest injustice will result if this severely injured railroad employee is required to relitigate his damages and face yet another appeal.

It is respectfully prayed that this Honorable Court grant this writ of Certiorari to review the Opinion and Judgment of the Court of Appeals, and for such other orders as appear proper to the Court.

Respectfully submitted.

By: _____
W. JAMES KRONZER, JR.
500 Houston First Savings Bldg.
711 Fannin Street
Houston, Texas 77002

CERTIFICATE

Three copies of the above and foregoing Petition for Writ of Certiorari have been furnished to Messrs. Mehaffy, Weber, Keith & Gonsoulin, 1400 San Jacinto Building, Beaumont, Texas 77701.

W. JAMES KRONZER

APPENDIX "A"

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 72-2338

R. P. DUGAS,

Plaintiff-Appellee,

versus

THE KANSAS CITY SOUTHERN RAILWAY LINES, ET AL,

Defendants-Appellants.

Appeal from the United States District Court for the Eastern District of Texas

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(February 2, 1973)

Before WISDOM, BELL and COLEMAN, Circuit Judges.

COLEMAN, Circuit Judge: The appellant, R. P. Dugas, was working for Kansas City Southern Railway

Company (KCS) as a car cleaner when a boxcar door fell, shattering his left hip, fracturing his right pelvis, and causing the loss of several pints of blood. He brought suit under the Federal Employers' Liability Act, 45 U.S.C., §51. The jury awarded damages in the sum of $200,000. The railroad appeals.

The judgment of the District Court will be affirmed as to liability but reversed and remanded for a new trial on the issue of damages.

Dugas alleged that there were imperfections in the door which caused it to fall off and which could have been discovered upon proper inspection by the railroad. He also invoked the doctrine of res ipsa loquitur.

On appeal, the railroad asserts that (1) the doctrine of res ipsa loquitur did not apply, (2) the trial court erred in its instruction on damages, and (3) the verdict is excessive.

Dugas' primary job with the railroad was to clean out boxcars in the KCS yard at Port Arthur, Texas. After empty cars come into the yard, they are channeled to the "cleaning track". Crews of two or four men open the boxcar doors, sweep out any debris, and wash the interior with a high pressure hose. The usual procedure is first to open the doors on all the cars to be washed and then to begin the cleaning process. The cars are not usually safety checked until they have been cleaned.

On the morning of May 25, 1970, Dugas and his coworker, Willie Lockridge, had opened four or five cars before reaching the boxcar which caused this litigation. They opened the door on one side of the car and

went around to the other side to open the other door. Dugas testified that Lockridge pried the door open with a small crowbar. Then they both pushed it open wider. Dugas stated that when the door was about halfway open *it fell off the car and onto him.*

Lockridge testified that if a side sill (a horizontal support bar on the bottom of the car) had been broken, he would have noticed it, and there was none broken. He also stated that he and Dugas shoved the door hard against the door stop and that it fell off only after it had hit the door stop.

Within five minutes of the accident, F. C. Arnold, Jr., a car foreman for the KCS with thirty-two years experience as a car repairman and car foreman, inspected the boxcar. He inspected the car door roller tracks and did not find any breaks or loose welds in them, nor did he find any breaks of the side sills. He said that the car cleaners would not have found anything wrong with the door if they had inspected it. Mr. Arnold further testified that if the opening door had been shoved hard against the door stops, it could cause the door to bounce off its tracks. He said that the boxcar in question "might have" received a customary walking inspection when it first entered the yard.

Subsequent to the accident, the car carried a load of drums to the Texas Company Terminal and then was sent to the KATY repair shop in Denison, Texas. M. E. Wilkinson, a car repairman with KATY Railroad, testified that the boxcar had several broken metal support braces underneath the car, including a cracked side sill. He stated that a broken side sill will cause vibrations when the car is running. These vibrations may cause a spot weld on the door's lower track to break and drop down. Mr.

Wilkinson stated that such structural defects might have caused the door to fall off. Neither Mr. Wilkinson's testimony nor the repair order card of the car showed any defect in the top track of the car's door.

J. H. Weis, a former car inspector for KCS who testified for Dugas, stated under cross-examination that this particular type of boxcar was one where the doors are attached to the top track and they did not slide on the bottom rails. All of the weight of the door is on the top, and the bottom is just a groove to guide the door when it opens and closes. But Mr. Weis did say that if the bottom track had dropped down, even slightly, then the door might slide out from the top track.

RES IPSA LOQUITUR

The railroad contends, for several reasons, that the doctrine of res ipsa loquitur was incorrectly applied in this case.

Ordinarily, there are three prerequisites to the application of the doctrine: (1) the accident must be of a kind which ordinarily would not occur in the absence of negligence on the part of someone; (2) the injury must be caused by an agency or instrumentality within the exclusive control of the defendant; and (3) the occurrence must not have been due to any voluntary action on the part of the plaintiff. *Furness, Withy & Company v. Carter*, 9 Cir., 1960, 281 F.2d 264; *Atchison, T. & S. F. Ry. Company v. Simmons*, 10 Cir., 1946, 153 F.2d 206.

In *Jesionowski v. Boston & Maine Railroad Company*, 329 U.S. 452, 67 S.Ct. 401, 91 L.Ed. 416 (1946), the

Supreme Court had occasion to consider the application of res ipsa to FELA cases, particularly the "exclusive control" features of that doctrine.

In that case a brakeman, while in the process of switching cars, was killed when a car was derailed, throwing him to his death. The Court of Appeals for the First Circuit had held that res ipsa loquitur could not be invoked in an extraordinary accident growing out of a set of circumstances which included activity of the injured person. Evidence on behalf of the railroad was sufficient to authorize, but not compel, a jury finding that the derailment was caused by the negligence of the deceased in handling the switch. There was other evidence from which a jury could have found that the derailment was caused by a defect in a frog operated with a spring mechanism. This was disputed by evidence to the effect that the frog and switch were in good condition both before and after the derailment.

Subsequent to a discussion of the general principles applicable to the use of res ipsa, the Supreme Court held that the rule as applied by the First Circuit

> "* * * would bar juries from drawing an inference of negligence on account of unusual accidents in all operations where the injured person had himself participated in the operations, even though it was proved that his operations of the things under his control did not cause the accident. This viewpoint unduly restricts the power of juries to decide questions of fact, and in this case the jury's right to draw inferences from evidence and the sufficiency of that evidence to support a verdict are Federal questions. A conceptualistic interpretation of res ipsa

loquitur has never been used by this Court to reduce the jury's power to draw inferences from facts. Such an interpretation unduly narrows the doctrine as this Court has applied it."

The judgment of the First Circuit was reversed.

The railroad argues that by opening the boxcar door Dugas was at least in partial control of the instrumentality whence came the injuries, thus defeating the application of the res ipsa doctrine.

We are of the opinion that the teachings of *Jesionowski* mandate the rejection of this argument.

Moreover, it is the settled law of this Circuit that res ipsa loquitur is proper even though the plaintiff attempts to prove exactly what happened. *Texas & Pacific Railway Company v. Buckles*, 5 Cir., 1956, 232 F.2d 257, cert. denied 351 U.S. 894; *Kansas City Southern Railway Company v. Justice*, 5 Cir., 1956, 232 F.2d 267, cert. denied 352 U.S. 833.

Since the doctrine of res ipsa loquitur is a rule of evidence it is not necessary that it be referred to in the pleadings. *Fassbinder v. Pennsylvania Railroad Company*, 3 Cir., 1963, 322 F.2d 859; *Ramsouer v. Midland Valley Railroad Company*, 8 Cir., 1943, 135 F.2d 101.

As pointed out in *Jesionowski, supra*, the Act creates federal rights protected by federal rather than state law, *Bailey v. Central Vermont Railroad*, 319 U.S. 350, 63 S.Ct. 1062, 87 L.Ed. 1444 (1943).

The next attack is aimed at the trial instructions on res ipsa.

Those instructions (which we have paragraphed for clarity) were as follows:

"Further, the Court would instruct you that in regard to the doctrine of res ipsa loquitur, the mere fact that an accident happened, standing alone, does not, unless otherwise expressly stated, permit the jury to draw the inference that the accident was caused by anyone's negligence.

"However, there is an exception to this general rule known as the doctrine of res ipsa loquitur.

"In addition to plaintiff's specific charges of negligence against the defendant, R. P. Dugas is also relying here upon the doctrine of res ipsa loquitur, which is a latin term meaning that the thing or occurrence speaks for itself.

"Res ipsa loquitur means that the facts of the occurrence may warrant an inference of negligence, not that they compel such an inference, but they furnish evidence of negligence where direct evidence may be lacking.

"But, it is evidence to be weighed, not necessarily to be accepted as sufficient, which may call for explanations or rebuttal, not necessarily that it requires such explanation or rebuttal. When a thing which causes injury which is under the control of the defendant and an accident as such as in the ordinary course of things does not occur if the one being in control uses proper care, it affords reasonable evidence in the absence of a reasonable explanation that the injury arose from the defendant's want of care.

"Therefore, the Court would instruct you if you find from a preponderance of the evidence that the thing which caused the injury, which in this case

was the door which was under the control of the defendant, and an accident as such as in the ordinary course of things does not occur if the one being in control uses proper care, and you further find from a preponderance of the evidence that the door was a contributing cause of the injury, then you will find for the plaintiff under the doctrine of res ipsa loquitur."

The problem with the instruction is to be found in the language of the last paragraph, wherein the trial court told the jury that the door was under the control of the defendant, rather than leaving that as an issue of fact for the decision of the jury. The railroad says that this amounted to a directed verdict for the plaintiff.

On its face, this is not an unreasonable contention.

It is not disputed that the door caused the injury. It can hardly be disputed that this was such an accident "as in the ordinary course of things does not occur with the use of due care". Then, at first glance, it would appear that if the railroad as a matter of law was in control of the door the circle was closed and the jury would have no alternative but to find for the plaintiff.

We, however, do not find the matter to be quite so simple.

Obviously, the railroad was in control of the boxcar and it was being cleaned at railrod direction. Nobody contends that Dugas had any control over its condition. We see no evidence in the record that there was any defect in the door *itself*. Any defective condition which may have existed was in the car, affecting the stability of the rails, roller tracks or other equipment by which the door

should have adhered to the car instead of falling off. We think that reasonable men could not have disagreed that these factors were indeed exclusively within the control of the employer, not the employee.

Of controlling significance is the fact that when this instruction was given, counsel for the railroad did not construe its impact as he would now have us to construe it, at the appellate level. He did not object to the instruction on the ground that it amounted to a directed verdict. He objected to the giving of any res ipsa instruction *at all*, arguing before the jury retired, Rule 51, Federal Rules of Civil Procedure, that "res ipsa was not a proper submission." He did not call the attention of the Court to the possibility that the terminology as to the control of the door was incorrect or misleading or both.

We, therefore, decline in the circumstances of this case to reverse on alleged error not presented to the trial court, *Dennis v. Central Steamship Corporation*, 5 Cir., 1972, 453 F.2d 137, 141.

It follows that the judgment as to liability must be affirmed.

We now proceed to a consideration of another phase of the instructions, dealing with the calculation of damages, to which the appellant did appropriately object, and which, in our opinion, necessitates remand for a new trial solely on the quantum of damages.

In *Chesapeake & Ohio Railroad Company v. Carnahan*, 241 U.S. 241, 36 S.Ct. 594, 60 L.Ed. 979 (1916), the Supreme Court approved an instruction which advised the jury in an FELA case for personal injuries that in assessing damages it might take into consideration

"the pain and suffering of the plaintiff, his mental anguish, the bodily injury sustained by him, his pecuniary loss, his loss of power and capacity for work and its effect upon his future". Numerous reported cases follow this decision and these standards.

We have already pointed out that the Act creates federal rights protected by federal law and that as to the propriety of jury instructions federal decisions are controlling.

In *Grunenthal v. Long Island Railroad Company*, 2 Cir., 1968, 388 F.2d 480, 484, reversed on other grounds, 393 U.S. 156, 89 S.Ct. 331, 21 L.Ed.2d 309 (1968), the Second Circuit held:

> "The instructions to the jury properly allowed a recovery for the loss of past earnings, the loss of future earnings, pain and suffering and inconvenience *including* (emphasis added) 'the effect of the injuries upon the normal pursuits and pleasures of life'."

We think the foregoing language is significant; the effect of injuries upon the normal pursuits and pleasures of life is an included item, not a separate one, that is, the normal pursuits and pleasures of life are to be included as a part of pain, suffering, and inconvenience. It is not a factor to be separately measured as an independent ground for damages.

While we have found no federal case, and we have been cited none, on the subject of "loss of vitality" we are equally certain that this item is an included element of the consequences of physical injury, not separately to be measured independently of the basic premise.

When the charge was completed, the railroad objected, as follows:

> "[I]n the charge where the Court charged that in the elements of damages recovery could be had on mental anguish and for loss of enjoyment of life and then recovery for physical impairment and loss of vitality, I think really they are one and the same, but the way the charge was given it sounds like there are a total of four elements involved, mental anguish, loss of enjoyment of life, physical impairment and loss of vitality, there are four separate elements of damage. Really mental anguish and loss of enjoyment is one thing and I believe the proper instruction on mental anguish, pain and suffering and on the other hand, physical impairment and those would be confusing and indicated additional grounds for recovery, that the law doesn't provide for."

Counsel for plaintiff responded that his requested instructions did "combine mental anguish construction" and that there would be no confusion "that the two are related". He further pointed out that the Court had said the jury was "to reach a result on these elements of damages so that there will be no duplication of damages of any one item."

He added, however, that if there was any doubt about it possibly the Court would prefer to clarify it. The Court thought that he had touched base, as counsel had indicated, and declined to say anything further.

We examine what the record shows to have actually been said to the jury. The elements of damage were submitted to the jury in the following language, adding emphasis to the use of the word "and":

> "Such physical pain, mental anguish *and* loss of enjoyment of life as the plaintiff has sustained from the date of occurrence until the date of trial, such physical pain *and* mental anguish *and* loss of enjoyment of life as plaintiff may in reasonable probability sustain in the future beyond this date, such loss of earning power, physical impairment, *and* loss of vitality as plaintiff has sustained from the date of the occurrence until the date of the trial; such loss of earning power, physical impairment, *and* loss of vitality as plaintiff will in reasonable probability sustain in the future beyond this date."

The Court wound up with the following language:

> "Further, you are instructed in considering the plaintiff's injuries and damages that you may also take into account physical impairment *and* loss of vitality as indicated herein. For example, you may consider the value of such physical impairment, the loss of vitality as you may find associated with plaintiff's condition which you have not already considered in your evaluation for Mr. Dugas' pain or mental anguish, past or future, to the end that the dollars and cents you find for plaintiff's physical impairment *and* loss of vitality should not constitute a double recovery for other damages you have already considered."

Despite the reluctance naturally experienced in the act of setting aside the quantum of damages awarded a badly injured, unemployed man, who can follow no occupation but that of a common laborer, this Court is compelled to do it for it clearly appears that the cited instructions repeatedly asserted "loss of enjoyment of life" and "loss of vitality" as if they were separate and independent, rather than includible, items of damages, or, at the very

least, they were couched in terms which could have confused the jury as to the correct standards it had a duty to apply in this regard. And this is true despite the warning at the close of the instructions, which mentioned duplication only in connection with "loss of vitality".

The defendant must pay damages, but it is entitled to have a jury measure those damages according to clear, legally correct, plainly enunciated standards, an obligation which the trial court no doubt intended but did not accomplish.

EXCESSIVENESS OF THE VERDICT

Appellants maintain that the $200,000 verdict is excessive and is the result of jury prejudice or confusion. The trial court overruled a motion for a new trial and request for a remittitur.

Since we have concluded that the case must be remanded for a new trial on the issue of damages alone, it ordinarily would not be necessary for us to consider the assignment that the jury awarded excessive damages. Since, however, that is the very issue which must be tried anew we feel that we should discuss that subject.

Appellant's injuries required extensive medical treatment. He did not undergo surgery until the day after the accident because his physician felt that he could not withstand its rigors on the same day of the injury. His feet were placed in traction so the injured bone fragments could be pulled into place. After the fragments were positioned as best as they could be, a metal nail three and a quarter inches long with an attached metal plate was placed in the leg to connect the shattered bone frag-

ments. This metal appliance remains in the leg and probably will not be removed unless irritation develops.

It was estimated that Dugas lost approximately six pints of blood before and during surgery. Anemia developed from the high loss of blood and transfusions were required. Subsequent hospitalization and a myelogram disclosed a ruptured disc. In the future the ruptured disc may require a laminectomy and/or spinal fusion.

Dr. Walter Glass, the orthopedic surgeon who treated Dugas, testified that:

> "* * * he has shortening of the leg, he has some restriction of motion in the hip joint due to scar tissue formation about the hip, he has the internal fixation plate and screws and Jewett appliance still in there. In other words, he is nowhere near the same condition that he was prior to the injury."

Some twenty months after the accident, appellee was still experiencing pain in his back and leg. Dr. Glass also stated that appellee was at least fifty per cent permanently disabled.

At the time of the injury Dugas was forty-two years old, with a fourth grade education and had no other formal schooling. He was trained for nothing except manual labor. He has been unsuccessful since the accident in obtaining employment.

On the authority of *Grunenthal v. Long Island Railroad Company, supra,* we judge the damage award not to have been excessive.

CONCLUSION

The judgment of the District Court on the issue of liability is affirmed.

The judgment as to the quantum of damages is reversed and remanded for a new trial solely on that issue.

Each party will bear his or its own costs.

WISDOM, Circuit Judge, Dissenting:

I respectfully dissent.

The boxcar door did not happen to fall on Dugas as he was passing by. It fell off when he opened the door. Dugas opened the door by banging it against the doorstop. In these circumstances, the jury should be permitted to decide whether the door was in the control of Dugas, for purposes of applying or not applying the res ipsa loquitur doctrine. In effect, the trial judge took over the jury's prerogative to decide the issue of control and directed a verdict on the application of res ipsa to this case.

I would reverse for a new trial.

I concur in the Court's holding that the trial judge's instructions on damages "could have confused the jury as to the correct standards it had to apply."

APPENDIX "B"

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 72-2338

R. P. DUGAS,
Plaintiff-Appellee,

versus

THE KANSAS CITY SOUTHERN RAILWAY LINES, ET AL,
Defendants-Appellants.

Appeal from the United States District Court for the Eastern District of Texas

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ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

(Opinion Feb. 2, 1973, 5 Cir., 1973, ____F.2d____)

(March 27, 1973)

Before WISDOM, BELL and COLEMAN, Circuit Judges.

PER CURIAM: The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the Petition for Rehearing En Banc is DENIED.

WISDOM, Circuit Judge, dissents.